

ROLE OF THE RULES REVIEW COMMISSION

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I. DESCRIPTION OF AGENCY

- **Statutory Creation**

The Rules Review Commission was created by the General Assembly in 1986. While there have been frequent changes since then, most of them have been technical in nature. However in 1995 the APA was changed to provide that unless a rule was approved by the RRC, then it could not take effect. It also significantly altered the rulemaking timeline and other procedures. The statutory authority is found in G.S. 143B-30.1 and following. Its substantive procedures are set by the General Assembly and are codified in the Administrative Procedures Act, Chapter 150B, Articles 1 and 2A (APA).

The RRC consists of ten commissioners appointed by the General Assembly, five on the recommendation of the President Pro Tempore and five on the recommendation of the Speaker of the House. They meet once per month and must have six members for a quorum. Although there is no requirement that they be attorneys, many of them are.

- **Statutory Process**

The RRC does not have rules published in the N.C. Administrative Code, the way most state agencies do. That exception is set out at 150B-1(d)(1). Its major procedures, rights, authority, and limitations have been set by the legislature. However, there are some procedural rules that have been followed by the RRC, and their substance is set out below.

II. SCOPE OF REVIEW

The majority of the statutory provisions concerning the RRC are found in Part 2 of Article 2A, 150B-21.1 and following. For the purposes of this part of the presentation, I will focus on the three standards the Commission uses in reviewing all rules before it.

- **Authority**

The first standard is whether a rule is within the authority delegated to the agency by the General Assembly. (G.S. 150B-21.9(a)(1))

This means we review the substantive statutes cited by the agency as their authority to enact a given rule to verify that the legislature has, in fact, authorized or required an agency to enact this rule.

Note that it is not enough that the federal government tells an agency to do something. If the state has not granted the agency the specific or general authority to either 1) do the specific act cited, or 2) carry out any federal requirements in relation to the program, then the agency has no authority to respond to the federal mandate.

In making the determination of whether or not the agency has the authority, we will look to see whether there is a broad grant of authority to do just about anything (e.g., "the agency

shall make whatever rules are necessary concerning the operation of a child care facility"); whether the agency has been specifically authorized or directed to tackle the specific subject ruled on (e.g. "the agency shall make rules concerning the menu at each child care facility"); whether there is some potentially limiting language in the statute (such as "the agency shall not place any limits on the diet of the residents"); whether, to our knowledge, there is a limitation in another statute ("no agency shall make any rules concerning meals served in child care facilities")' and, possibly the most arguable, whether there is a limitation implied in the statute.

This last one is sometimes the hardest to determine. It most often comes about when a statute directing an agency to make rules starts listing areas to make rules about, and does not specifically allow them to make "any other rules necessary" or some such language. There will also be similar examinations when a grant of authority allows rules to "carry out the purposes of this chapter". If the rule goes beyond the specific purposes set out in the statute, then there will be questions raised.

- **Clarity**

All rules must be clear and unambiguous. G.S. 150b-21.9(a)(2).

The example I will use to illustrate this standard came across my desk not long ago and is, in my opinion, a clear example of unclear language. Please don't take this as singling out DHHS for any attack.

Take 10 NCAC 14K .0103(11) and the (A) and (B) components of "atypical development." One is forced to ask what is the difference between "diagnosed ... behavioral disorder" in (A) and "identified ... behavioral disorders" in (B). Further in (B), what is the difference between a "failure to respond to most ... interactions" and a "persistent failure...?"

In (18) the rule defines "...supervision" partially by reference to a "qualified ... professional." Until the RRC raised questions concerning who or what a "qualified professional" was, that term was undefined. That ultimately means that there is an unclear standard about whether or not the supervision was proper and within the required limits. You are talking about whether or not someone is entitled to a job here.

- **Necessity**

A rule must be reasonably necessary to fulfill a duty delegated to the agency by the General Assembly. (G.S. 150B-21.9(a)(3))

In the past we did our best to avoid passing judgment on this standard. However, the legislature has made it clear that it wants us to at least subject rules to a "reasonably necessary" scrutiny.

It is clear that if an agency sends us a rule that repeats the statute, or does not actually impose a requirement, or forbid some action, then we may use this provision of our statute to object to it.

- **Compliance with the Procedural Requirements**

In addition to reviewing rules for meeting the standards of authority, clarity, and necessity, we also review rules to make sure an agency has complied with the procedural requirements for enacting those rules. Entry of a rule in the NCAC after review by the RRC is conclusive evidence that the rule was adopted in compliance with the procedural requirements of Article 2A and presumably the rule is not open to further attack on this basis. (G.S. 150B-21.9(a))

III. THE ACTUAL PROCESS

- **Filing and Deadline**

All rules must be filed by the 20th day (or the close of the first business day thereafter if it's a holiday) of a given month for review at the following month's meeting. If it comes in after 5:00 P.M. of the 20th, then the rule will be reviewed in two months. 5:01 P.M. is after 5:00 P.M.

- **RRC Meeting**

The Commission must meet once a month and that meeting is almost always on the third Thursday of each month.

- **Staff Review**

One of the RRC's staff attorneys will review the rule to see if it meets the above standards, including compliance with the procedural requirements. We also review it for any typographical, grammatical, or stylistic problems.

- **Technical Changes**

If we discover problems of a less substantial nature, such as a typographical error, or using "should" instead of "shall" or "may," we send, usually within two weeks, a Request For A Technical Change. That request may also embody more substantive problems also, but ones we figure an agency will see right off the bat are problems that it did not notice, but are not likely to argue about, such as unclear or undefined terms. Those corrections need to be made immediately and returned to us before the meeting.

- **Staff Opinions**

The staff attorneys review all rules received and usually recommend to the Commissioners that they either approve or object to each rule. Occasionally we will recommend studying the rule further or make comments without making a direct recommendation. Those recommendations carry heavy weight but are not at all conclusive. At least once per month (and the pace may be accelerating) the Commissioners will do the opposite of what the staff recommends.

About the time an agency receives the technical change request, or a couple of weeks before the Commission meeting, the APA coordinator, as well as anybody else, may call the office to determine the staff opinions on the agency's various rules before us.

The agencies typically may not rewrite rules to meet an anticipated objection prior to the meeting and prior to any official objection by the RRC, although they will still be allowed to make any technical changes that have been requested prior to the meeting. They also are generally not allowed to withdraw a rule once it has been filed with the RRC. The major exception would be if the staff's (or agency's) problem is with either a new rule (adoption) with new language in an existing rule and not the existing language. The other major circumstance allowing an agency to withdraw a rule before the RRC would be if there was a fatal flaw in the agency's procedure in adopting the rule that would not entitle them to be at RRC in the first place.

- **Commission Meeting and Procedures**

The RRC meets once each month, usually the third Thursday, and considers all rules filed by the 20th of the preceding month. It must consider all the rules before it that month and has three options: approve a rule, object to a rule, or extend the period of review on a rule. If it does either of the latter two, then the rule will be considered again at the next meeting. Eventually, the RRC must either approve or object to a rule.

- **Objections and Rewritten Rules**

If the RRC objects to a rule, then the agency must respond and either attempt to satisfy the Commission's objection by rewriting the rule or inform the Commission that it will not change the rule and ask for it to be returned. (G.S. 150B-21.12). No rule that the RRC has objected to may be filed in the NCAC. If a rule is objected to because of existing language, then the agency will have to satisfy the objection or the rule will be removed from the Code.

To my knowledge, no rule that the RRC has objected to, and that has gone up through the state appellate courts, has been supported by those courts. In the few cases that have gone up, the rules have all been invalidated.

Please note: Any rewritten rule has to come from the agency itself, such as the Child Care Commission, and not from the agency staff. However, the RRC does not generally make its own determination of where the rewritten rule is coming from. In other words, if the agency wishes to delegate authority to its staff to rewrite a rule to meet RRC objections, that is the agency's business. So it is up to the agency itself as to how much authority to give its staff in rewriting rules without them going back to the full board or commission. This also does not take into consideration any public meeting requirements or obligation to notify the public of an intent to make a change to the rule.

If the rule is rewritten to satisfy the RRC's objections, then it will be approved and filed with the OAH.

- **Approval and Filing with OAH**

When a rule is approved, we transmit the rule to OAH where it is entered into the NCAC. I am not going into the timetable for inclusion in the NCAC, since there are a number of different combinations. You should know that the general rule is that it will become effective on the 31st legislative day of the next regular session of the General Assembly (held more than 25 days after the rule was approved by the RRC).

Finally, even approved rules will still be subject to a more explicit legislative scrutiny than before the changes to the APA. (All rules have always been subject to some degree of legislative oversight. After all, the legislature could always pass a bill prohibiting some agency practice or rule.) All approved rules will be reviewed by the Joint Administrative Procedures Oversight Committee. If this committee, or any individual legislator, files a bill to disapprove a specific rule, then that rule will not go into effect until final action is taken on that bill or that session ends.